Supreme Court, U.S.
FILED
SEP 4 1998
CLERK

No. 98-294

In The

# Supreme Court of the United States

October Term, 1997

DUANE FLESCH,

*Petitioner,*

vs.

CHARLES WRANOSKY,

*Respondent.*

**On Petition For Writ Of Certiorari To Wisconsin Court Of Appeals**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ATTORNEY JOHN W. SAARI
*Counsel of Record*
RODD, MOUW, SAARI & KRUEGER, S.C.
8-A West Davenport Street
P. O. Box 757
Rhinelander, Wisconsin 54501
(715) 365-3030
*Attorneys for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

ARGUMENT ..... 1

I. PETITIONER'S STATEMENT OF THE CASE VIOLATES THE REQUIREMENTS OF SUPREME COURT RULE 14.1(g)(i)..... 1

II. NO FEDERAL QUESTION WAS "PRESSED OR PASSED UPON BELOW" ..... 1

III. THE WISCONSIN SUPREME COURT REFUSED TO ACCEPT PETITIONER'S PETITION FOR REVIEW IN THAT COURT BECAUSE OF A NEUTRAL STATE RULE REGARDING THE ADMINISTRATION OF ITS COURTS..... 4

CONCLUSION ..... 7

# TABLE OF AUTHORITIES

Page

SUPREME COURT CASES:

*Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62, 108 S.Ct. 1645 (1988) ..... 3

*Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985) ..... 4

*Cardinale v. Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969) ..... 2

*Howlett v. Rose*, 496 U.S. 356, 110 L.Ed.2d 332, 110 S.Ct. 2430 (1990) ..... 5

*Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983) ..... 2, 3

*Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983) ..... 4

*Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981) ..... 2

*Yee v. City of Escondido*, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992) ..... 3

STATE CASES:

*First Wisconsin National Bank of Madison v. Nicholaou*, 87 Wis.2d 360, 274 N.W. 2d 704 (1979) ..... 6

*St. John's Home of Milwaukee v. Continental Casualty Co.*, 150 Wis.2d 37, 441 N.W. 2d 219 (1989) ..... 6

WISCONSIN STATUTES:

Sec. 808.10, Wis. Stats. ..... 5

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIALS:

42 U.S.C. Section 1983 ..... 5

Supreme Court Rule 10 ..... 1

Supreme Court Rule 14.1(g)(i) ..... 1, 7

Wisconsin Supreme Court Rule 809.62(1) ..... 4, 5

## ARGUMENT

### I. PETITIONER'S STATEMENT OF THE CASE VIOLATES THE REQUIREMENTS OF SUPREME COURT RULE 14.1(g)(i).

Petitioner's statement of the case fails to include any specification of the raising of a federal question in the court below, as required by Rule 14.1(g)(i). As pointed out below, this omission from petitioner's statement of the case was necessary, because no federal question was raised or passed upon in the courts below. Therefore, Rule 10 (considerations governing review on certiorari), does not allow this Court to grant petitioner's writ.

First, this is not a case emanating from a United States Court of Appeals. Secondly, the state court of last resort has not decided any federal question. Thirdly, the state court has not decided any federal question that should be settled by this Court, because no federal question was raised or passed upon in the court below.

Therefore, merely as a matter of the application of this Court's rules, petitioner's writ should be denied.

### II. NO FEDERAL QUESTION WAS "PRESSED OR PASSED UPON BELOW".

The petitioner's argument and appendix conclusively reveal that petitioner failed to raise any federal question whatsoever in the court below, and that the Wisconsin Supreme Court refused to accept petitioner's petition for review in that court due to state procedural grounds. Thus, no federal question was raised or passed upon by that court.

This Court's earlier decisions held that, in cases such as the instant one, this Court lacked jurisdiction to consider the question presented. *Cardinale v. Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969). See also *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981), where the Court held,

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

451 U.S. 493, 496-497.

More recently, this Court has expressed some doubt as to whether this rule is one invoking the jurisdiction of this Court, or whether this Court, having jurisdiction, would find the acceptance of such a case to be imprudent. See *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), setting forth the decisions creating the conceptual dichotomy in prior decisions of this Court.

The *Gates* Court likewise examined the reasons underlying the "not pressed nor passed upon" rule. As that Court held, the first reason is that questions not raised below are likely to have an inadequate record upon which this Court can base a ruling. In the instant case, obviously, there is no record of any federal question upon which this Court can base a ruling.

Secondly, state courts, as a matter of comity, should be given an opportunity to consider the constitutionality of their own statutes, rules and the actions of their officials.

Third, the Court recognized that the state court may, if allowed, rest its decision on an adequate and independent state ground.

Respondent suggests that, whether this Court considers the "not pressed nor passed upon below" rule to be jurisdictional or prudential, the instant case falls squarely within the reasons why this Court should refuse to review this decision. All of the reasons set forth in *Gates* apply here.

In *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62, 108 S.Ct. 1645 (1988), this Court declined to address the appellant's challenges to the size of the punitive damages award in that case, even though the appellant had attempted to raise the issue in the court below, because this Court found that the appellant's vague and general appeal to constitutional principles was insufficient to adequately raise the question. In the instant case, petitioner has totally failed to raise the question, and the court below has not, therefore, passed upon it.

*Yee v. City of Escondido*, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992), is in accord with *Gates* and *Crenshaw*. The *Yee* Court, while not deciding that the rule was jurisdictional or prudential, held that,

> Even if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.

503 U.S. 519, 533. Respondent suggests that, for all the reasons set forth in the above-cited cases, the same conclusion should apply to the instant case.

## III. THE WISCONSIN SUPREME COURT REFUSED TO ACCEPT PETITIONER'S PETITION FOR REVIEW IN THAT COURT BECAUSE OF A NEUTRAL STATE RULE REGARDING THE ADMINISTRATION OF ITS COURTS.

First, respondent points out that this is not a case such as *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983), where the state court considered both federal and state questions in its decision, and the controversy is whether or not the state court's decision rested on independent and adequate state grounds. As pointed out above, because no federal question was ever presented to the state court, the state court's decision rests solely on state grounds. However,

> The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.

*Caldwell v. Mississippi*, 472 U.S. 320, 327, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985). In the instant case, however, it is clear that the Wisconsin Supreme Court rested its decision on independent and adequate state grounds.

Wisconsin Supreme Court Rule 809.62(1), sets forth, in relevant part, as follows:

> A party may file with the supreme court a petition for review of an adverse decision of the

> Court of Appeals pursuant to Sec. 808.10 within 30 days of the date of the decision of the Court of Appeals. Supreme Court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented.

Wisconsin Supreme Court Rule 809.62(1) is based upon a statutory provision, Sec. 808.10, Wis. Stats. That section provides as follows:

> A decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court. The petition for review shall be filed in the supreme court within 30 days of the date of the decision of the court of appeals.

The foregoing statute and rule clearly apply to all litigants before the Wisconsin Supreme Court. As such, they constitute a neutral state rule regarding the administration of its courts. *Howlett v. Rose*, 496 U.S. 356, 110 L.Ed.2d 332, 110 S.Ct. 2430 (1990). The *Howlett* case involved the refusal of the Florida state courts to accept a claim brought under 42 U.S.C. Section 1983 in state court. This Court held, in *Howlett*, that Florida was not at liberty to refuse to entertain such suits, under the Supremacy Clause of the United States Constitution. The instant case, however, involves no refusal on the part of Wisconsin to entertain a federal cause of action, because no federal claim was ever raised before the Wisconsin courts.

The Wisconsin Supreme Court's rule requiring petitions for review to be filed within 30 days of the date of the decision of the Court of Appeals deprives the Supreme Court of subject matter jurisdiction.

> We hold that failure to comply [with the 30-day time limit] deprives this court of subject matter jurisdiction. The objection is not subject to waiver, and will be raised by this court *sua sponte*.

*First Wisconsin National Bank of Madison v. Nicholaou*, 87 Wis.2d 360, 364, 274 N.W. 2d 704, 706 (1979).

Further,

> It has always been recognized that the timely filing of a petition for review is necessary to invoke this court's appellate jurisdiction. *See* First Wis. Nat. Bank of Madison v. Nicholaou, 87 Wis.2d 360, 274 N.W. 2d 704 (1979). To be timely, a petition for review must be filed within 30 days of the date of the decision of the court of appeals; that 30-day filing deadline is specified by the legislature, sec. 808.10, Stats., and by this court's own rule, sec. (Rule) 809.62(1).

*St. John's Home of Milwaukee v. Continental Casualty Co.*, 150 Wis.2d 37, 42, 441 N.W. 2d 219, 221 (1989).

Therefore, the Wisconsin Supreme Court lacked subject matter jurisdiction to entertain petitioner's petition to review in that court, pursuant to a neutral state rule regarding the administration of its courts.

Furthermore, petitioner had no right to have his case reviewed by the Wisconsin Supreme Court. Had that court accepted his petition, it would certainly have denied it. As the decision of the Court of Appeals, set forth at Appendix A, pages 5 through 8 of petitioner's petition reveals, not only were all of the issues properly raised by petitioner in that appeal properly dismissed for more than one reason, the Court of Appeals affirmed the

trial court's holding that petitioner's case was frivolous. The Wisconsin Supreme Court, under those circumstances, would hardly have granted petitioner's petition in that court.

## CONCLUSION

Petitioner's statement of the case fails to comply with Supreme Court Rule 14.1(g)(i), for the reason that no federal question was either raised or passed upon below. The case was decided by the court below on an independent and adequate state ground, a neutral procedural rule regarding the administration of the Wisconsin state court system. This Court should, therefore, deny petitioner's petition for writ of certiorari.

Dated this 4th day of September, 1998.

JOHN W. SAARI
*Counsel of Record*
RODD, MOUW, SAARI &
KRUEGER, S.C.
*Attorneys for Respondent*

8-A West Davenport Street
P. O. Box 757
Rhinelander, Wisconsin 54501
(715) 365-3030